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No. 79-1404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL & HOSPITAL, *et al.*

Petitioners,

v.

TERRI LEE HALDERMAN, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF ILLINOIS, NEW HAMPSHIRE, LOUISIANA, OHIO, SOUTH DAKOTA, WASHINGTON, WEST VIRGINIA, NEBRASKA, NEW JERSEY, TENNESSEE AND MINNESOTA

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INTEREST OF AMICI CURIAE

The States of Illinois and New Hampshire are currently engaged in the development and implementation of comprehensive deinstitutionalization plans concerning the majority of individuals now receiving care in public institutions for the mentally retarded. Both state legislatures have recognized the importance of this effort and substantially increased funding. The goal of that increase is to expand community-based services as well as to improve existing state-operated institutions. It must be stated at the outset therefore, that Amici

do not oppose deinstitutionalization where appropriate, nor do they condone conditions as were found to exist in the Pennhurst State School and Hospital.

In addition, many of the states joining in this amicus brief are defending at this time at least one major lawsuit, some of them class actions, raising the same issues decided by the courts below.[1] The states, therefore, have a very real and substantial interest in this Court's interpretation of the nature, scope and constitutionality of their obligations as participants in the funding scheme promulgated by the Developmentally Disabled Assistance and Bill of Rights Act (hereinafter the "Act"). Without guidance from this Court, the states' mandated long-term planning efforts will continue to be thwarted by the difficulties of reconciling the Act's provisions (and especially the Third Circuit's interpretation thereof) with those of other applicable federal statutes (*e.g.*, Medicaid Act, Title XIX, 42 U.S.C. § 1396 *et seq.;* the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.;* the Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq.*) and the United States Constitution.

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[1] The State of New Hampshire completed a ten-week trial on these issues in June 1980 and is awaiting a decision thereon by the federal district court. Garrity v. Gallen, C.A. No. 78-116 (D.N.H.). Cases involving other states include: *Illinois Association for Retarded Citizens, et al.* v. *Governor James Thompson, et al.*, 80-C-0914 (N.D. Ill.); *Washington Association for Retarded Citizens, et al.* v. *Thomas*, C-79-1235V (W.D. Wash.); *Medley Macel et al.* v. *Leon Ginsberg, Commissioner of West Virginia, Department of Welfare, et al.*, 78-Civ-2099 CH (W.Va., S.D.); *New Jersey Association for Retarded Citizens, Inc., et al.* v. *Klein et al.*, 79-1632 (D.N.J.); *Barbara C.* v. *Timothy Moritz et al.*, C-2-77-887 (S.D. Ohio); *Henkin* v. *Dept. of Social Services, et al.*, 78-4088 (D.S. Dak.); *Welsh* v. *Noot*, 4-72-451 (D.Minn.) (formerly *Welsh* v. *Likens,*) 550 F.2d 1122 (8th Cir. 1977)) It should be noted that not all states joining in this brief have similar issues presently being litigated in the federal courts, *e.g.* the State of Nebraska has entered a consent decree in the case *Horacek* v. *Exon*, 72-L-299 (D. Neb).

Amici address below the fundamental issue and error of the Court of Appeals' decision: the construction of the least restrictive environment provision of the Bill of Rights, 42 U.S.C. § 6010(2), so as to impose a sweeping and mandatory duty upon states, independent of the receipt of federal funds and absent workable standards. That duty as defined by the Court of Appeals, is that the states provide special services to *all* developmentally disabled persons, (irrespective of their individual status and the degree of present state involvement in their care and habilitation). Such special services include the creation by the states of community-based alternatives to existing state-operated facilities.

Such a ruling by the Third Circuit has significant ramifications both to provision of services to the developmentally disabled and in potential financial impact on the states. Relying on powers granted pursuant to Section 5 of the Fourteenth Amendment, the Court has held that Congress may mandate an affirmative right to services from the state to one group of citizens which no other group enjoys. The creation of such an affirmative right not only constitutes a frontal assault on the fiscs of the states, *cf. NYSARC, Inc., et al.*, v. *Carey,* Civil Nos. 80-7289, 80-7295 (2nd Cir., filed June 4, 1980) and *Welsh* v. *Likens,* 550 F.2d 1122 (8th Cir. 1977), and on the powers granted to the states under the Tenth Amendment, *cf. National League of Cities* v. *Usery,* 426 U.S. 833 (1976), but creates the very distinct possibility of a plethora of potential equal protection suits by other handicapped citizens claiming the same rights granted to the developmentally disabled. For if the developmentally disabled may be "confer(red) an entitlement to such funds as may be necessary to realize the advantages of . . . freedom," *Harris* v. *McRae,* 48 U.S.L.W. 4941 (U.S. June 30, 1980), or to the maximization of their developmental potential in the setting least restrictive of their personal liberty, 42 U.S.C. § 6010(2), all other disadvantaged citizens should have such an entitlement as well.

Further, and more importantly, the obligation imposed upon the states by the Act, as construed by the Third Circuit, takes away from the states their traditional function of directing the care and treatment of the developmentally disabled and places that function with the federal government. The construction of the Act by the Third Circuit therefore raises fundamental questions of federalism which must be addressed by this Court.

SUMMARY OF ARGUMENT

It is the position of the Amici that the relief ordered by the Court of Appeals for the Third Circuit in *Halderman* v. *Pennhurst,* 612 F.2d 84 (3rd. Cir. 1979) is based on an erroneous construction of the Developmental Disabilities and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, as a whole, and in particular on an interpretation of the provisions of Section 6010(2) of that Act. By reading provisions of Section 6010 to create private substantive rights for all developmentally disabled citizens and concommitant obligations on the states to provide services to such persons, regardless whether states receive or expect funds under the Act or have in any way intruded on the liberty of these individuals, the Court imposed obligations on the states regarding disabled citizens which are vague, unworkable, unrealistic and far different from the obligations the states have to their non-developmentally disabled citizens. In so doing, the Court awarded relief contrary to the plain language or legislative histories of the Act, or to the Fourteenth Amendment.

In part I of the Argument, Amici will discuss the provisions of the Act, determining that, to the extent that Congress intended to benefit developmentally disabled citizens through the 1975 and 1978 Amendments thereto, it did so by the design of a complex system of allotments of funds to the states for the purpose of filling gaps in the state service systems for those citizens. The structure of the Act and the history of those

Amendments make clear that in providing benefits to this group, Congress followed a pattern consistent with other enactments under its spending powers. Congress assisted and encouraged the states to improve services to the developmentally disabled through financial allotments to states and the provision of requirements in state plans by which programs so funded would be monitored and implemented. The Act evidences no intent, whatsoever, on the part of Congress to create substantive rights separate from funding under the Act.

Part II of the Argument assumes *arguendo* that the Bill of Rights section of the Act did create substantive rights and then examines the scope and meaning of these rights based on the statute and Constitutional law. Amici here focus on the Court's holding that the right to treatment in a setting least restrictive of a person's liberty placed an affirmative obligation on the states to create community alternatives for developmentally disabled persons, except in certain rare cases which were only vaguely described by the Court.

Amici believe that this construction of Section 6010(2) is based on a central and erroneous premise, as a matter of both statutory and Constitutional law; *i.e.*, that the right to treatment in a "least restrictive environment" is equivalent to a preference or mandate for de-institutionalization. As a matter of statutory construction, the Court's finding of a "preference for de-institutionalization" in Section 6010(2) is flawed for two reasons. First, the implication of such a preference in that Section rests on a misreading of the history of the 1975 Amendments. That history illustrates that to the extent any such preference was contained in those bills, it was inextricably tied to the funding sections which back Title III of the Act and was never equated with the "rights" which were enacted in Section 6010(2), a compromise of a different section of one of these bills. It is, therefore, inappropriate to read Title III of the Act to interpret the provisions of Title II. Second, although the

Court did read the Act this way and found such a preference in Title III, its statutory analysis was selective in that it failed to consider the 1978 Amendments to Title III which are interpretative of Section 6010(2).

While the Act does not support the relief ordered below, the Court also construed its interpretation of Section 6010(2) as being within the scope of judicially declared "rights" under the due process clause of the Fourteenth Amendment. This construction is plainly erroneous; any right to treatment under the Constitution is limited to situations in which a liberty interest is impaired. It therefore follows that the touchstone for any inquiry regarding the restrictiveness of that treatment is liberty, and whether that liberty may be freely exercised elsewhere. The Courts have not and should not measure restrictiveness of treatment against current notions of effectiveness of treatment settings. The lower Court's construction of the language in Section 6010(2) would convert a Constitutional right to freedom from unwarranted governmental intrusions on personal liberty into an affirmative right to the creation of alternative settings by the state. The creation of such a right is unsupported by, and contrary to judicial decisions, exceeds Congress' Fourteenth Amendment powers, and ignores the integrated plans and policies of the states to care for their developmentally disabled.

ARGUMENT

I.

THE BILL OF RIGHTS SECTION OF THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT CREATES NO SUBSTANTIVE RIGHTS IN FAVOR OF THE DEVELOPMENTALLY DISABLED.

The instant matter turns upon the construction of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (hereinafter the "Act"). As interpreted by the Third Circuit, the Act and particularly the Bill of Rights sections thereof creates a right to treatment and/or habilitation in favor of the developmentally disabled, and places on the

states a mandatory obligation to provide that habilitation in the least restrictive environment. The latter phrase was construed by the Court as being a "community environment" in all but a few cases. *Halderman* v. *Pennhurst,* 612 F.2d 84, 107 (3rd Cir. 1979) (hereinafter "*Pennhurst*"). Such a construction is entirely without basis in either the plain language of the Act, the regulations interpreting the Act, or in its legislative history.

A.

The DD Act: Requirements on Participating States.

The Act, like the Medicaid Assistance Program under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.,* provides grants to states electing to participate in the program. The overall purpose of the program can be found by looking to the language of the Act: "to *assist* states to assure that persons with developmental disabilities receive the care . . . necessary to enable them to achieve their maximum potential . . ." (emphasis supplied) 42 U.S.C. § 6001(b)(1). The assistance provided under the Act comes in the form of federal grants to participating states. The grant must be expended by the state pursuant to a state plan which is approved by the Secretary of Health and Human Services. 42 U.S.C. § 6063(a). The plan must describe in detail the specific objectives to be achieved and list the programs and resources to be used to meet the objectives. 42 U.S.C. § 6063(b)(a)(A). Further, the state plan must be supported by assurances that the human rights of all persons receiving services assisted by monies provided under the Act will be protected. 42 U.S.C. § 6063(b)(5)(C).

Other requirements on the states which participate in the Act's grant program include: the establishment of a protection and advocacy system to champion the rights of persons with developmental disabilities, 42 U.S.C. § 6012; the establishment of a state planning council to serve as advocates of persons with

developmental disabilities, 42 U.S.C. § 6067; and a requirement of a habilitation plan for each person receiving services assisted under the Act, 42 U.S.C. § 6011.

The sanction contained in the Act for failure to continue to satisfy the requirements placed upon participating states is the termination or reduction of the federal grant. 42 U.S.C. § 6065. No private right of action is recognized in the Act. As can be seen from the plain language of the statute, the Act was enacted to assist the states in providing habilitative services to their developmentally disabled population, not to mandate any specific type of service.

B.

The Bill of Rights, 42 U.S.C. § 6010.

The Bill of Rights section of the Act, 42 U.S.C. § 6010, when read in conjunction with the entire Act, stands as a Congressional statement of underlying policy which serves as the foundation and explanation of the elaborate funding mechanism seen in the Act. Section 6010, when read in this context, cannot be interpreted as a mandate for the states or a statement of legally enforceable individual rights. The very language of Section 6010 negates such a construction.

In all other sections of the Act which mandate some action on the part of participating states, that action is clearly specified. See: 42 U.S.C. §§ 6010(3), 6011, 6063, and 6065. In stark contrast is the language of Section 6010 which begins: "Congress makes the following *findings* respecting the rights of persons with developmental disabilities . . ." (Emphasis supplied.) Such language cannot and does not create obligations on the part of the states. Instead it is, as is stated above, an introductory statement of underlying policy or a preamble. "Findings" are meant to serve as guidance to the courts in the interpretation of an act and are meant to justify and support the

action taken by Congress in its passage. See generally: *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 (1938); *Maryland* v. *Wirtz,* 392 U.S. 183, 189 (1968). It is generally recognized that language found in a preamble of a statute and not seen elsewhere confers no rights not otherwise enacted. *Yuzzo R.R. Co.* v. *Thomas,* 132 U.S. 174, 178 (1889).

The location of Section 6010 in the Act as passed, rather than as codified, supports the characterization of the section as a preamble. Public Law 94-103, 89 Stat. 486 (1975) contained three Titles. Title I concerned the provision of services and facilities to the developmentally disabled. Title II encompassed the rights of persons with developmental disabilities and Title II contained several miscellaneous provisions. Section 6010 was the preface of Title II followed by provisions later codified as Section 6011 (requirement of individual habilitation plans), 6012 (establishment of protection and advocacy systems), and 6009 (requirement that HEW establish evaluation system to assure *inter alia* the rights enunciated in 42 U.S.C. § 6010 were protected.) The Congressional findings in Section 6010 were designed simply to serve as the rationale for the mechanisms set forth in the remainder of Title II, which would implement those findings.

Finally, the language of the "findings" themselves indicates that Section 6010 was intended to be merely directory and not create substantive obligations on the part of the states. In Section 6010(2) and (4) the directory "should" is used as opposed to the mandatory "shall". Had Congress intended to create enforceable legal rights, it certainly could have chosen more direct, forceful language to accomplish its purpose. Indeed, it used such language in this Act; in contrast to this directory language in Section 6010 are those provisions of the Act which do in fact mandate action on the part of participating states, *i.e.,* Sections 6011(a)(b), 6012, 6063 and 6067.

In Section 6011(a) it is stated, "the Secretary *shall* require as a condition to a state's receiving an allotment . . . a habilitation plan . . . ." Mandatory language similarly appears in Section 6011(b) where it is stated, "a habilitation plan for a person with developmental disabilities *shall* meet the following requirements . . . ." Section 6012 of the Act which requires the establishment of a protection and advocacy system provides, "the Secretary *shall* require as a condition to a state receiving an allotment . . . that the state . . . will have in effect a system to protect and advocate the rights of persons with developmental disabilities . . ." Similarly, in Section 6063 which contains the requirement for submission of a state plan, the mandatory "must" is used throughout rather than the directory "should." Finally, in Section 6067 which requires the establishment of the state planning council, the mandatory "shall" is used to describe the state's obligation. It can therefore be seen that where Congress intended to place specific mandates on states participating in funding grants under the Act it did so directly with forceful, commanding language. In light of this comprehensive reading of the Act, Section 6010 stands out as merely precatory, designed to encourage, rather than mandate, a desired course of conduct.

C.

The Legislative History of the Bill of Rights Provision.

The *Pennhurst* court assumed that the Bill of Rights provisions of the Act, as added in 1975, created a "maximum duty" on the states, in contrast to the minimum expenditure requirements in Title III of the Act. 612 F.2d at 107. The legislative history of the Bill of Rights negates any such conclusion.

The Bill of Rights sections of the present Act resulted from a "compromise" joining together the 1975 House (H.R. 4005) and Senate bills (S. 462) to create the 1975 amendments to the

Act. The major focus of the "compromise" was on this Bill of Rights, for while the House bill contained no such provision whatsoever, Title II of the Senate bill contained some 330 pages of standards to assure the humane care, treatment, habilitation and protection of the mentally retarded and other persons with developmental disabilities served by residential and community facilities and agencies. See statements of Congressman Rogers, 121 Cong. Rec. 29309 (1975), Senator Williams, *Id.* at 29821.

The "compromise" of the Bill of Rights in Title II is important in two respects: first, like the House bill, and Title I of the Senate bill, the declarations in Title II were not designed to create any rights or obligations except pursuant to the receipt of grants by various facilities and agencies as defined in the Title.[2] It is therefore inconsistent with the history of the Bill of Rights to read the watered down version of Title II to create a "maximum duty" different from an "expenditure requirement."

Second, S. 462 included specific procedural criteria designed to assure that the Bill of Rights provision was fully implemented. See S. Rep. No. 94-160, 94th Congress, 1st

[2] The structure of Title II of S. 462 clearly establishes that the bill was not intended to create general obligations, but rather "to stimulate the states to develop alternative programs of care for the mentally retarded," 1975 Senate Report at 1, through appropriations to the states. Title II was divided into four parts. Part A, which contained the general provisions for residential and community facilities, set forth compliance provisions relating to the standards established for facilities and agencies pursuant to Parts B, C and D of the title. See 121 Cong. Rec. at 16477-16480. The provisions of the various criteria for evaluating individuals (Part B) and institutional (Part C) and community (Part D) facilities all must be read in connection with the compliance standards in Sections 203-206 of the title. With regard to the specific provisions of Part D relating to community facilities, the provisions of each section of that part are specifically limited to facilities and agencies receiving federal assistance under this Act. See, e.g., Sections 286(b), 287(b), 288(b), 289(b), 290(a), 291(b), 292(b), 294(b), 295(b), 296(c), 299(b), 299A-299X(b).

Session (1975) at 45-46 (hereinafter "1975 Senate Report"). The Conference Committee rejected the explicit standards implementing the Bill of Rights in the Senate version of the Act in favor of a more generalized statement of Congressional "findings." H.R. Conf. Ref. No. 94-473, 94th Congress, 1st Session (1975) at 961 (hereinafter "1975 Conference Report"). This rejection is also evidence that Congress had no intent to create an enforceable "maximum duty" on the states.

The comments of the House Conferees regarding the nature of the compromise further negate the finding of any such intent. In speaking of the compromise Congressman Rogers stated:

> With respect to the Senate's very long second title, we were able to get them to agree to a much shorter version . . . which makes a brief statement of the rights of the developmentally disabled to appropriate treatment and care. *These are modest requirements which we were able to find among the Senate's long list of standards and considered reasonable at this time.* (Emphasis supplied) 121 Cong. Rec. 29309 (1975).

The Senate Conferees discussing the compromise also recognized the shortened Bill of Rights provision to be solely a statement of Congressional policy. As Senator Javits stated in discussing the Bill of Rights:

> Mr. President, this "Bill of Rights" represents a reaffirmation of the basic human and civil rights of all citizens. It provides the *direction and framework* for improving the overall situation of this country's mentally retarded and other developmentally disabled individuals. (Emphasis supplied) 121 Cong. Rec. 29830 (1975)

See also statement of Senator Williams, 121 Cong. Rec. 29821 (1975).

It can therefore be seen that the Conference Committee report and the statements of the conferees recognized that the

Bill of Rights section of the Act, as adopted by Congress, was a statement of policy which contained "modest requirements" to give the states some "direction and framework" within which states receiving funds under the Act should operate. Reading the Bill of Rights to create a "maximum duty" does violence to this legislative history and the fact that Title II was compromised.

D.

Regulations Implementing the Act.

The regulations implementing the Act, while extensively governing the funding mechanisms in the Act, contain no regulations implementing the Bill of Rights Sections of the Act in such a way as to create an affirmative duty on the states. Instead, the regulations reinforce the stated purpose of Congress in enacting the Act. The regulations provide:

> The purpose of the Act is to *improve* and *coordinate* the provision of services to persons with developmental disabilities. . . . . (Emphasis supplied) 45 C.F.R. § 1385.1

With regard to the issue of deinstitutionalization, the regulations reiterate the goals of Congress and require the state plan to address the elimination of inappropriate placement of developmentally disabled and the improvement of care of persons who are appropriately placed in institutions. 45 C.F.R. § 1386.42. In detailing the requirements to be placed upon participating states in planning for community alternatives to institutionalization, the regulations provide:

> The state plan shall support the establishment of community programs as alternatives to institutionalization and support such programs designed to provide services for the care and habilitation of persons with developmental disabilities, and which utilize, to the maximum extent feasible, the resources and personnel in related community programs to assure full coordination with such programs

> and to assure the provision of appropriate supplemental health, educational or social services for persons with developmental disabilities. 45 C.F.R. § 1386.43.

The above provisions can hardly be said to create sweeping rights on behalf of the developmentally disabled. If anything, the regulations recognize that the Act was meant to be a funding mechanism only to encourage the stated goals. This construction is further confirmed by the fact that the only sanctions contained in the regulations for failure to comply with their terms is a withdrawal or reduction of payments. 45 C.F.R. § 1386.2, 1386.16. Indeed, while those regulations newly proposed by the Rehabilitation Services Administration (which have yet to be promulgated) do contain a section dealing with the rights of persons with developmental disabilities, 45 Fed. Reg. 31008, May 9, 1980, even those proposed regulations do nothing to create enforceable rights on the part of the developmentally disabled. Instead, the sanction for failing to fulfill the requirements of the regulation is a possible loss of funding received under the Act. Thus, the construction given to the Act by the Court of Appeals is contrary to the construction of the agency responsible for enforcing the Act. In such cases, the construction of the agency should be given great weight by the reviewing court. *Brennan* v. *General Telephone of Florida*, 488 F.2d 157 (5th Cir. 1973).

In light of the foregoing, the Act and the Bill of Rights provisions thereof can only be construed as a Congressional statement of purpose underlying a complex funding mechanism designed to assist and encourage the states to further develop community alternatives to institutionalizaton.

II.

THE PENNHURST COURT'S INTERPRETATION OF THE "LEAST RESTRICTIVE ENVIRONMENT" STANDARD OF THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT IS CONTRARY TO THE ACT, THE LEGISLATIVE HISTORY OF THE ACT AND THE UNITED STATES CONSTITUTION.

In Part I, Amici have shown that the Act in general, and the Bill of Rights sections in particular, do not create rights or affirmative duties on the part of the states independent of the grant of federal assistance. However, assuming *arguendo* that this Court should find that the Act does create enforceable rights apart from its spending provisions, it is essential to address the scope of the rights which the Third Circuit found to have been created in the Act, for, as Chief Judge Seitz noted in his dissent, the ultimate issue is not so much the issue of whether a right was created by the Act, but rather, the "contours and substance of the right." 612 F.2d at 117.

The Court of Appeals concluded that the Act creates an affirmative duty on the part of states to deinstitutionalize residents of institutions, irrespective of costs, available resources or state policy. That conclusion was based on the premise that the language in 42 U.S.C. § 6010(2) that treatment be "provided in the setting that is least restrictive of a person's personal liberty," is equivalent to a "preference for deinstitutionalization." *Id.*, 612 F.2d at 104. Finding that "preference" in the provision of Title III of the Act, and in its legislative history, the Court used those sources to build the preference into a presumption that "deinstitutionalization is the favored approach to habilitation," 612 F.2d at 115, and to conclude that all persons residing at the Pennhurst State School & Hospital should be placed in the "community" except in rare circumstances.

The Court's construction of the Act and the concomitant obligations that flowed from that construction rest on one

central and erroneous assumption: that as a matter of statutory construction and/or Constitutional law, the phrase "least restrictive environment" is equivalent to deinstitutionalization. This equation is plainly erroneous under any reasonable reading of the Act, its legislative history, or the Constitution.

A.

Neither the Legislative History of the Act in General nor of 42 U.S.C. § 6010(2) in Particular Supports the Result Reached by the Third Circuit.

In its construction of the rights created by the Act, including the right to treatment in the "least restrictive environment," the *Pennhurst* majority asserted that the Act created maximum duties, through its Bill of Rights sections, while construing other sections of the Act, namely, the state plan requirements in Title III, 42 U.S.C. §§ 6061 *et seq.* to be only minimum expenditure requirements. 612 F.2d at 107. Although the Court of Appeals recognized a basic difference between the provisions of 42 U.S.C. § 6010(2) and the state plan sections of the Act, the Court chose to selectively use the state plan or "minimum expenditure" sections of the Act to interpret the very sections it saw as creating maximum rights.

The Court's analysis of the rights created by the Act rests on a fundamental error in statutory construction. References to deinstitutionalization seen in the language and legislative history of the more limited "state plan" sections of Title III of the Act, in particular in 42 U.S.C. §§ 6063(b)(20) and (23) were used by the Court to interpret the provisions of 42 U.S.C. § 6010(2). The legislative history of the Act demonstrates that the deinstitutionalization sections were always separate from any general rights and were never used to interpret, explain, or define the portions of the bill which became Section 6010. In short, even assuming *arguendo* that Section 6010(2) was designed to create substantive rights, those rights were never equated with deinstitutionalization by the draftsmen of the Act.

An inherent inconsistency in analysis compounds this fundamental error in statutory construction. After assuming that the provisions of the state plan section of the Act had created a preference for deinstitutionalization in the Bill of Rights section, the Court ignored the fact that later amendments to the Act deleted all language that could serve as the basis for that preference. When the legislative history of, and the 1978 Amendments to, the Act are examined, it is clear that there is simply nothing in the Act or its history which supports the construction given to Section 6010(2) by the Court of Appeals.

1.

The Legislative History of the 1975 Amendments.

The Court of Appeals found a general right to treatment in the least restrictive environment in 42 U.S.C. § 6010(2). As noted in Part I C, *supra,* that section emerged from the Conference Committee report regarding the proposed 1975 Amendments to the Act, and in particular from the provisions of Title II of S. 462. A review of the provisions of Title II itself demonstrates that nothing in that Title supports the Court's construction of Section 6010(2) as creating a preference for deinstitutionalization or any affirmative obligation to create community placements.

As Amici have shown above, the rights contained in Title II of the proposed Senate bill were limited by the receipt of funds. However, more important to the instant discussion is the fact that even though the Title contained some 48 definitions in its 330 pages, it never defined the terms "least restrictive environment" or "deinstitutionalization", much less equate the two. See 121 Cong. Rec. at 16477-16514.

While it did not define the term, Title II of S. 462 did refer to the concept of "least restrictiveness." Yet, here again the legislative history cannot support the broad interpretation of the

phrase adopted by the Court. Generally speaking, the concept was used to describe a manner of treatment which would be "least restrictive" of the person's capabilities and needs, or "conducive to development." See, *e.g.*, §§ 211(e) and 299X(b)(2)(B) of Title II of S. 462 at 121 Cong. Rec. 16481 and 16512. In the Committee Reports, the term was given several different interpretations. *Cf.* 1975 Senate Rep. at 28, 31, 33, 48, and 51. But in both the Act and the Senate Reports, the requirement of least restrictiveness was never specifically equated with placement out of an institutional facility, nor is it imposed as a requirement separate and distinct from funding. Indeed, other language in Title II demonstrates that where the Senate wished to refer to community placement as opposed to the least restrictive environment, they did so in specific language. See, for example, Section 215(12), 121 Cong. Rec. at 16481, Section 223, *Id.* at 16482, and Section 268, *Id.* at 16498.

When Title II was "compromised" in the Conference, Section 6010(2) emerged in its current form. The language relating to treatment in the least restrictive setting referred not to principles of treatment or deinstitutionalization but to restrictions on liberty, a fact which at least one court has found significant. See n. 6, *infra*. The Conference Committee itself said absolutely nothing about the "right" created in Section 6010(2); it simply referred to it in passing in the Report. 1975 Conf. Rep. at 42.

As noted in Part I-A, *supra*, in all of the laws preceding the 1975 Amendments, Congress had legislated in the area of developmental disabilities by providing grants to states for planning, administration, construction and other services. The creation of federal priorities or preferences was accomplished by the control over federal funds in the form of state plan requirements. In 1975, when Congress sought to add provisions regarding deinstitutionalization to the law it was consistent with past practices; *i.e.*, it added those provisions to the funding sections of the Act.

The House version of the 1975 Amendments contained a specific earmark for deinstitutionalization by requiring each state to use a given portion of its allotment for "developing and implementing plans designed to eliminate inappropriate placements in institutions," and by including, in the state plan requirements, a plan to eliminate such placements. See 1975 Conf. Rep. at 32-33. These sections became 42 U.S.C. §§ 6062(a)(4) and 6063(b)(20) of Title III. The House bill contained no bill of rights whatsoever; rather, the obligations it imposed regarding deinstitutionalization were limited solely to funding and even then, the obligations were limited to as much deinstitutionalization "as was feasible." 42 U.S.C. § 6063(b)(20). The history of the House bill certainly cannot be read to have created a general requirement of deinstitutionalization.

The Senate bill addressed the issue of deinstitutionalization in the same manner as the House bill, *i.e.*, by the addition of specific goals to the state allotment and planning portions of the bill. See 1975 Senate Report at 16-17; 1975 Conf. Rep. at 33; and 121 Cong. Rec. at 16473-16477. Although much attention has been focused on the broad Bill of Rights section, the only specific reference to deinstitutionalization in the Senate bill was contained in Title I of that bill. As in the House version, the requirement of deinstitutionalization in the Senate bill was tied to funding granted to the states and was a limited obligation designed to create community alternatives to institutions to the "maximum extent feasible." See § 114(a)(5) of S. 462; 121 Cong. Rec. at 16475. See also H.R. Conf. Rep. at 32.

The structure of the bills which became the 1975 Amendments demonstrates that to the extent that concerns or obligations regarding deinstitutionalization were included in the 1975 Amendments, they were: (1) limited to *feasible* deinstitutionalization to be accomplished pursuant to federal funding; and (2) included in the state plan sections of the bills, which became Title III of the Act. The creation of any preference for

deinstitutionalization as expressed in these bills and was, and is, totally unrelated to the allegedly more general obligations in Section 6010(2) which were contained in the compromise that grew out of Title II of the Senate bill. The provisions of Title III cannot be read to create a broad obligation out of the compromise of Title II.

Similarly, the comments of Senators and Congressmen, with regard to the Act, must be read with reference to the bills being discussed. For example, the majority uses the comments of various Congressmen on the House bill, H.R. 4005, to interpret the provisions of 42 U.S.C. § 6010(2). See 612 F.2d at 104-105. However, at the time the cited comments were made, the House version of the bill contained absolutely no bill of rights section or any reference to the term "least restrictive environment"; the comments referred solely to an obligation to be imposed through state plans. While those comments may support a "preference for deinstitutionalization," that preference is totally unrelated to the concept of least restrictive environment ultimately seen in the Bill of Rights section.

The same problem exists with respect to the comments of various Senators cited by the Court. In nearly every case, those comments were made specifically with respect to the provisions of Title I of the Senate bill, which were later incorporated in the state plan sections of the Act rather than with respect to the Bill of Rights section which contained references to the least restrictive alternative. See, *e.g.*, comments of Senator Randolph, 121 Cong. Rec. at 16516; Senator Williams, *Id.* at 16517; Senator Cranston, *Id.* at 16520; Senator Stafford, *Id.* at 29819; and Senator Williams, *Id.* at 29821.[3]

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[3] Indeed, as was the case with the House comments cited above, the various comments of the Senators cited by the Court at 612 F.2d at 105-107 were made prior to the compromise which added Section 6010(2) to the bill and thus cannot be read to construe that section.

In summary, when the 1975 House and Senate bills which added a "preference for deinstitutionalization" are examined more carefully, it becomes clear that any preference in the state plan section of the Act cannot be used to interpret the provisions of the Bill of Rights section and certainly cannot support the equation of a general right to treatment in the least restrictive alternative with a right to deinstitutionalization.

2.

The 1978 amendments

Assuming, *arguendo*, that the Court properly interpreted references to deinstitutionalization in Section 6063 to create a preference in Section 6010(2), consistent statutory interpretation requires that the 1978 Amendments affecting that preference be taken into account. The Court of Appeals used Title III selectively, ignoring those Amendments, which destroyed any preference that might arguably have been created in 6010(2) in 1975.

In 1978 Congress acted to clarify the goals created in the Amendments of 1975, to give the states further direction in the expenditure of funds, as well as further discretion in the operation of state programs.[4] Congress accomplished these

[4] It is noteworthy that in spite of the Court's conclusion that a clear preference for deinstitutionalization had been created in 1975, Congress found no such clarity. The House committee considering the 1978 Amendments found that the states were "lacking clear legislative or administrative guidance concerning priorities." H.R. Rep. No. 95-1188, 95th Cong. 2nd Sess. (1978) at 10. If the impact of the 1975 Amendments was to create a clear preference for deinstitutionalization and to establish a mandatory obligation on the part of the states to create community services, one must wonder why the matter was so confused in 1978. Whatever the reason for that confusion, its resolution by Congress hardly supports the contention that such a preference or mandatory right was created. It is also noteworthy that the 1978 House Report and Conference Report, H.R. Conf. Rep. 95-1780 (1978) makes no mention of the Bill of Rights sections.

ends by deleting the minimum expenditure requirements in U.S.C. § 6062(2)(4), as well as the "insistence on specific deinstitutionalization plans in Section 6063," on which the Court relied to find a preference. See 42 U.S.C. § 6063 as amended by P.L. 95-602, 92 Stat. 3011. As amended the Act provided further flexibility to the states in the expenditure of funds by identifying four areas of priority services. The states would be required to spend the funds alloted under the Act in no more than two of those four areas which included: individual case management; child development services; alternative community living arrangement services, and non-vocational social developmental services. See U.S.C. § 6063(b)(4). Under the 1978 Amendments, deinstitutionalization was no longer recognized as a preference. To the extent that deinstitutionalization remains a goal, it is only one of four priorities under the Act. See 42 U.S.C. § 6001(b).

In addition to the establishment of the four priority areas of service, the 1978 Amendments provide that a state must expend not less than $100,000 or 65 percent of the amount available to the state, whichever is greater, for "service activities" in "not more than two" of the priority service areas. See U.S.C. § 6063(b)(4)(B)(iv)(I). The term "service activities" is defined for purposes of that section as including among other activities: "activities to increase the capacity of institutions and agencies to provide services in the area." 42 U.S.C. § 6063(b)(4)(B)(iv).

In light of the deletion of any specific reference to deinstitutionalization in the 1978 Amendment, it is highly questionable whether it is still possible to find any preference for deinstitutionalization in Section 6010(2) or in the Act. Moreover, by reading together the definitions of priority services and "service activities," it is clear that a state may now expend all of its funds to increase the capacity of its institutions to provide services in one of the priority areas, for example, case management. The result in *Pennhurst* cannot be sustained.

B.

The Relief Ordered By the Court of Appeals Goes Beyond Any Liberty Interest Granted Pursuant to the Fourteenth Amendment.

Since neither the legislative history of 42 U.S.C. § 6010(2) nor the Court's interpretation of that section in light of Title III of the Act supports the Court's broad reading of the obligation to provide habilitation in the least restrictive environment, it is necessary to look elsewhere to determine the "contours and substance" of that right. The Court of Appeals looked to the Constitution. Amici agree that this is the proper source of construction of any "right" which might have been created in 42 U.S.C. § 6010(2); however, the Court was plainly wrong when it concluded that:

> "Section 6010 does not go beyond what has been judicially declared to be the limits of the fourteenth amendment . . ." 612 F.2d at 98.

In contrast to its discussion of a broad constitutional right underlying the right to treatment, i.e., "a right to be free from and obtain judicial relief for unjustified intrusions on personal security," derived from *Ingraham* v. *Wright*, 430 U.S. 651 (1977), the Court of Appeals identified no such "judicially declared" right in its later discussion of the right to least restrictive environment. Instead, the Court simply referred to *Ingraham* and to various constitutional cases cited by the District Court to conclude that it had "no doubt about Congressional power to impose the least restrictive alternative requirement upon the states for patients who do not require institutionalization for adequate habilitation." 612 F.2d at 107; *see also, Id.* at 104, n. 27. Using these precedents, the Court of Appeals ordered relief which: (1) created a right to treatment or habilitation in the least restrictive alternative for persons who have never had any liberty interest impaired by the State; (2) interpreted that right in reference to the most effective or most appropriate placement, rather than with reference to restrictions

on liberty; and (3) created an affirmative duty on the part of the states to create alternatives for the exercise of freedom.

Such relief cannot be derived from *Ingraham* or from any of the decisions cited by the Court. The relief ordered is plainly erroneous in each of its aspects. First, the right to treatment/habilitation and the related least restrictive alternative principle arise only when a liberty interest is implicated. Second, since the concept of least restrictiveness is related to a liberty interest only, it does not create a right to the most effective treatment or to placement in the most effective setting. Third, nothing in *Ingraham* or any of the other cases cited by the Court converts the right to be free from unjustified intrusions on liberty into an affirmative right to the creation of alternatives to permit the exercise of liberty. The relief granted by the Court of Appeals would convert the principle of "least restrictiveness" which, to the extent it has been judicially recognized, is designed to limit governmental intrusions on a person's liberty, into an affirmative obligation on the part of government to create or to provide the means for realization or individual freedom.

A proper understanding of the Court's erroneous construction of the principle of least restrictiveness must begin with the right to treatment to which that principle has been connected. It is well established that the states have no constitutional obligation to provide services to its citizens absent Fourteenth Amendment considerations. *San Antonio School District* v. *Rodriquez,* 411 U.S. 35 (1973); *Lindsley* v. *Normet,* 405 U.S. 56 (1972); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *NY-SARC, Inc. and Parisi, et al.* v. *Carey,* Civil Nos. 80-7289, 80-7295 (2nd Cir., filed June 4, 1980); *Rone* v. *Fireman,* 473 F.Supp. 92, 118 (N.D. Ohio 1979); *New York State Association for Retarded Citizens* v. *Rockefeller,* 357 F.Supp. 752, 761 (E.D.N.Y. 1973). To the extent that any constitutional right to habilitation or treatment for mentally retarded or mentally ill individuals has been found, it has been limited to persons involuntarily committed by the state to institutions, *see, e.g.*

Wyatt v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *see also* cases cited at 612 F.2d 115, n. 38. It is uncontroverted as a matter of constitutional law that:

> The right of any individual to treatment exists only by reason of, and is wholly dependent on, derived from and concomitant with a deprivation by the state of the individual's Fourteenth Amendment liberty right for the purpose of treatment. *Rone* v. *Fireman, supra*, 473 F.Supp. at 119. See also *Harper* v. *Cserr*, 544 F.2d 1121, 1122-1123 (1st Cir. 1976).

Yet in spite of this judicial authority to the contrary, the Third Circuit construed the Act in a manner which created a right to habilitation in the least restrictive environment for all developmentally disabled persons, regardless of whether any liberty interest had been impaired by the states.

In addition to its failure to recognize that any right to habilitation/treatment is derived from a deprivation of liberty, the Court of Appeals also ignored the limitations on that right imposed by this Court. The right to treatment arises only where the liberty intruded upon can be freely exercised absent such an intrusion. *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). Donaldson was involuntarily confined in a mental institution even though he was dangerous neither to himself or others and could survive in freedom with assistance. The Fifth Circuit had concluded that since the only basis for Donaldson's confinement was treatment, the state had a constitutional duty to provide him with adequate treatment. This Court, however, did not go that far, but held only that "a State cannot constitutionally confine without more a nondangerous individual *who is capable of surviving safely in freedom* by himself or with the help of willing and responsible family members or friends." (Emphasis added.) *Donaldson, supra*, 422 U.S. at 476.

Given the scope of the judicially declared right to treatment as enunciated in the above-cited cases and by this Court in *Donaldson*, the only proper construction of the principle of

least restrictiveness in treatment or habilitation is one which measures the level of restrictiveness in relation to the individual's ability to independently exercise liberty in one environment as opposed to another. The concept is not a measure of the effectiveness or appropriateness of one environment over another.[5] Indeed, § 6010(2) itself refers to the "setting that is least restrictive of the person's personal liberty," 42 U.S.C. § 6010(2) and not to a "most appropriate," or "community" setting.[6]

Those Courts which have considered the issue have supported this construction and have rejected the Third Circuit's interpretation of the principle of least restrictiveness as a presumption of preference for deinstitutionalization or as a

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[5] This, of course, is nearly identical to the argument adopted by the dissent in *Pennhurst*. Indeed, it was because of the inability of the retarded to live independently in society that Chief Judge Seitz felt that the principle of least restrictiveness should not be applied in civil commitment cases, 612 F.2d at 127-128. Amici believe that Chief Judge Seitz' analysis of the constitutional arguments is correct and completely undercuts the majority's assertion of any broad right in § 6010(2).

[6] It is not coincidental that the language of § 6019(2) reflects the language in *Donaldson*, which clearly enunciated that the standard for determining whether an individual was entitled to treatment was whether the individual could exercise personal liberty outside an institution. Indeed, in *KARC* v. *Conn*, *infra*, the Court found it to be of "some significance that the [Act] was passed in 1975 after the decision of the Supreme Court in *O'Connor* v. *Donaldson*." In June of 1975, when the Act was originally introduced, Senator Javits referenced the fact that *O'Connor* v. *Donaldson* was before this Court. 121 Cong. Rec. at 16519. *Donaldson* was decided on June 26, 1975. At that time, Title II of the Senate bill contained references to the least restrictive environment which did not refer to liberty. However, when Title II was compromised in September of 1975, the compromised version of the section reflected the language of this Court's decision in *Donaldson*. It is therefore highly appropriate that § 6010(2) be construed in a manner consistent with *Donaldson*.

right to the most effective form of treatment.[7] *See, e.g., Gary W.* v. *Louisiana,* 437 F.Supp. 1209, 1217-19 (E.D.La. 1976); *Wyatt* v. *Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *Welsch* v. *Likens,* 550 F.2d 1122 (8th Cir. 1977). Indeed, apart from *Pennhurst,* the courts have squarely rejected the claim that the state cannot constitutionally provide services for the mentally retarded in a state institution, or that deinstitutionalization is the favored form of habilitation. *Wyatt* v. *Ireland,* Civ. Act. No. 3195-N (N.D. Ala. filed Oct. 25, 1979) *Id.; Kentucky Ass'n. of Retarded Citizens* v. *Conn.,* Civil No. C 780157 L(A), (W.D. Ky. filed March 21, 1980).

The case law firmly supports Amici's contention that the Constitution does not establish the right to habilitation in the most appropriate setting, nor does it create a right to the best treatment available. In *Wyatt* v. *Ireland, supra,* Judge Johnson stated that the "minimum constitutional standards for adequate habilitation" did not "define habilitation as deinstitutionalization in all cases." *Id.* at 13.

In his opinion,

> [t]here is debate within the profession concerning the beneficial effects of community placement for the severely and profoundly retarded. The Court will not choose sides

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[7] It is quite possible that this Court has rejected the application of the less drastic means analysis to the conditions of civil commitment. In *State* v. *Sanchez,* 396 U.S. 276, (1970) the Court dismissed an appeal from a case which has rejected the least restrictive alternative test for "want of a substantial federal question."

> in this debate. Nor should it. . . . Determining the ideal mode of treatment, or ordering state institutions to implement the best system is beyond the province of the Court. [Footnote omitted] Slip Op. at 7.

Judge Johnson's reluctance to raise professional opinions, preferences or presumptions to the level of constitutional principles is well founded.[8] As the Court explained in *Gary W.* v. *Louisiana, supra,* 437 F.Supp. at 1218-19, in the context of an action challenging the institutionalization of mentally retarded and other children from Louisiana:

> Many of the plaintiff's expert witnesses presented what I considered sound expositions of what is presently known concerning the most desirable ways to treat children. But, just as "The Fourteenth Amendment does not enact Mr. Herbert Spender's Social Statics," *Lochner* v. *N.Y.,* 1905, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (Holmes, J., dissenting) it does not codify current theories concerning child development or the treatment of the mentally retarded.
>
> In developing the substantive requirements implicit in the constitutional mandate of due process, courts must be careful not to impose inexorable bonds that incorporate judicial sentiments, however noble, or contemporary theories, whether social, economic, medical or psychological. Even though the constitution's precepts are evolutionary, it is after all a constitution, and not a textbook that can be revised periodically.

Indeed, although the Court of Appeals cited the decision in *Gary W.* as supporting the right to "the least restrictive setting consistent with individual habilitative needs," Court found that the "term 'least restrictive setting' is more a slogan than a constitutional imperative." *Id.* at 1209.

More recently, the Federal District Court for the Northern District of Ohio clarified the difference between a right to

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[8] It is noteworthy that the author of the decision referred to in the comment of Senator Javits relied on by the Court, see 612 F.2d at n. 17, has adopted a contrary view of the scope of the right, said to have been created in the Act, pursuant to the Fourteenth Amendment.

habilitation in the least restrictive setting and a right to habilitation in the setting which will produce the most effective results:

> As the right to treatment develops from the deprivation of liberty for that purpose, the touchstone of the Court's inquiry must be liberty. The concern is not whether the treatment is restrictive in terms of its effectiveness, but whether the method of treatment is overly restrictive of liberty . . . Due process clearly does not incorporate and require the provision of the particular mode of treatment currently preferred by most mental health professionals. As long as treatment within the hospital environment does not by comparison unduly burden the individual's liberty interest, the Court cannot find that the Constitution requires the provision of treatment in alternate settings. *Rone* v. *Fireman, supra,* 473 F. Supp. at 125.

In sum, the "scope and contour" of the constitutional right to habilitation in the least restrictive setting as interpreted by the courts does not encompass the right to treatment in a "normalized" setting or create any preference for deinstitutionalization. The first right is concerned with liberty, the latter with effectiveness of habilitation or treatment. Thus, the Court of Appeals was in error when it ruled that the term "least restrictive environment" should be equated with a preference for deinstitutionalization or the most appropriate treatment under the Fourteenth Amendment.[9]

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[9] Nothing in the cases cited in footnotes 27 and 38 of the Court's decision (except perhaps for the consent decrees) supports a contrary interpretation of the principle of least restrictiveness from that adopted by Amici. Indeed the principle in those cases demonstrates that it was precisely in the context of a comparison between the independent exercise of personal freedom and state intrusions on that freedom that the principle was devised. For example, *Lessard* v. *Schmidt*, *Suzuki* v. *Quisenberry*, *Lynch* v. *Baxley*, and *Eubanks* v. *Clarke*, cited by the Court, applied the principle to determine whether initial commitment to an institution or transfers between institutions

(Footnote continued on following page)

Finally, the Circuit Court's application of the least restrictive environment principle in § 6010(2) to impose an affirmative obligation to create community settings is without support in the case law. See n. 9, *supra*. This construction of the statute would convert a principle which limits state intrusions on liberty into a mandate on the part of state governments to provide services and find alternatives permitting the exercise of that freedom. As the above cited cases demonstrate, the Constitution is not so broad. It confers minimum rights and does not afford individuals any rights to services absent a deprivation of liberty much less a right to ideal services. *See, e.g., Wyatt* v. *Stickney*, 344 F.Supp. 387, 391-392 (M.D. Ala. 1972), *aff'd. in part, remanded in part, and decision reversed in part, Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir.1974); *Wyatt* v. *Ireland, supra; Gary W.* v. *Louisiana, supra;* and *NYSARC and Parisi* v. *Carey, supra.* If the Constitution imposes no affirmative obligation to provide services absent a deprivation of liberty, it cannot read to require the states to create alternatives by which liberty may be exercised if an individual cannot freely do so. Indeed, this Court's recent decision in *Harris* v. *McRae*, 48 U.S.L.W. 4941 (U.S. June 30, 1980), upholding the constitutionality of the federal appropriation acts limiting funding

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were available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not appropriate. *Lessard* v. *Schmidt*, 349 F. Supp. at 1096, the principle of least restrictiveness was applied to limit the states power to commit, not to impose an obligation to create alternatives to the commitment. *Wyatt* v. *Stickney* and *Welsch* v. *Likens* applied the principle to determine the least restrictive treatment consistent with individual confinement *within the facility in question*, not to require the creation of alternative placements. These decisions, therefore, demonstrate that the principle of least restrictiveness as applied by the lower courts concerns the infringement of personal liberty which might have been freely exercised absent a state intrusion. It is therefore erroneous to interpret those cases as creating a preference for one form of treatment or an affirmative obligation on the states' parts to provide services.

for abortions under the Social Security Act rejected any such reading of the Due Process Clause of the Constitution.

As the discussion of the Due Process Clause in *McRae* makes clear, a constitutional limitation on governmental infringements of protected rights does not give rise to any concomitant affirmative right to services under the Constitution.

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation . . .
>
> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. . . . To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. 48 U.S.L.W. at 4946-4947.

As was the case with the welfare recipients in *McRae,* the obstacle to the exercise of freedom by the developmentally disabled (*i.e.,* their handicap) is not an obstacle of state creation. The *McRae* decision establishes that while a retarded person may have a right against unwarranted government interference with his or her freedom of choice or personal freedom, that right does not confer a right to such financial support as might entitle that individual to realize the advantages of freedom in an alternative setting. Simply put, any obligation of the state under the Due Process Clause not to

infringe on one's liberty in an institutional setting does not convert the Due Process Clause into an affirmative action clause requiring the state to fund alternative facilities.

Since the relief ordered in *Pennhurst* finds no support in "judicially declared constitutional rights" the Court's stated basis for imposing the least restrictive alternative requirement on the states is clearly erroneous and must be reversed.

In light of the statutory language of the Act and of the discussion of the decisions of this Court in *Donaldson* and *McRae,* the proper meaning of Section 6010(2) can only be that expressed by Chief Judge Seitz in his dissent:

> Drawing from *Jackson, Donaldson,* and *Bell,* I would hold that where the state confines [footnote omitted] a person against his or her will because of an inability of that person "to avoid the hazards of freedom," the conditions of that confinement must bear a reasonable relationship to the purpose of the confinement. I do not believe that a state can be constitutionally required to care for that person in a manner "least restrictive" of that person's freedom. Nevertheless, the availability of less drastic alternatives is one factor for a court to consider in determining the overall reasonableness of the challenged restraint. *See, e.g., Bell* v. *Wolfish,* [99 S.Ct. 1861, 1885 n. 40 (1979)]. 612 F.2d at 129.

Assuming therefore, that a right was created by Congress in the Act, a proper construction of the Constitution compels the conclusion that this right was limited to the right: a) to be released from institutional care when the individual can reside freely or with the willing help of family and friends; or b) to the least drastic means of confinement for individuals within an institution. Freedom from restraint on personal liberty requires nothing more. See also *K.A.R.C.* v. *Conn, supra.*

C.

The Construction of 42 U.S.C. § 6010(2) by the Court Exceeds Congress' Power to Legislate Pursuant to Section 5 of the Fourteenth Amendment.

On two occasions in the past fifteen years, this Court has confronted the scope of Congressional enforcement power under Section 5 of the Fourteenth Amendment. See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) and *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). These two cases have engendered extensive debate among the commentators[10] as well as a division among the members of this Court on the question whether Congress may, in the enforcement of the Amendment through Section 5, define the substantive scope of the Amendment.[11]

Amici submit that it is not necessary to enter into that debate here for two reasons. First, under the standard adopted by the Court of Appeals itself, the decision below must be remanded or reversed. Second, under any interpretation of Section 5, the Court's construction goes beyond the Congressional power of enforcement.

The Third Circuit recognized that serious questions would arise if the Court's construction of the Act as a "predicate for private substantive rights," rested solely on the spending power of Congress. 612 F.2d at 98. The issue was not raised the Court found because: (1) the Supreme Court had recognized

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[10] See, *e.g.*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. at 79; see also Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities* v. *Usery*, 125 U. PA. L. REV. 665 (1977).

[11] Cf. The decisions in *Oregon* v. *Mitchell* evidence the extent of this disagreement. *Cf.* decisions of Harlan, J., 400 U.S. 152, 204-209, Black, J., *Id.*, 119, 126-131 and Stewart, J., Id., 281, 292-296 with the Opinion of Justice Brennan, *Id.*, 289, 278-281 and Douglas, *Id.*, 135, 141-144.

an underlying constitutional right to be enforced by Congress; and (2) Section 6010(2) as construed did not go beyond those judicially declared rights. The Court of Appeals therefore accepted a limitation on Congressional power similar to that advocated by Justice Harlan in *Morgan*, see Harlan, J., dissenting, 384 U.S. 641 at 843, and Professor Bickel, *supra*, n. 10 at 97-98. In short, the Court recognized that the Courts, not Congress, determine the scope and contour of substantive rights under Section 5 of the Fourteenth Amendment and that Congress cannot act to enforce rights not recognized by the judiciary.

Here, the Court's own standard provides an independent basis for reversal since, as Amici have shown in Part II-B, *infra*, not only does the Court's interpretation of Section 6010(2) exceed the judicially declared limits of the "right" it saw Congress as creating, but that interpretation is directly contrary to the decisions of this Court in *Donaldson* and *McRae*. Congress therefore, by the Court's own standard, had no authority to enact the right the Court found in Section 6010(2).

Assuming that this Court should apply a different standard regarding Congress' power under Section 5, it must still be asserted the Third Circuit's interpretation of 6010(2) cannot be sustained as a valid exercise of that Section.[12] No court,

[12] In spite of the Court's willingness to find that Congress intended §§ 6000 *et seq.* to "enforce the recognized constitutional rights" 612 F.2d at n. 17, Congress intended no such result. First, it is extremely doubtful that Congress would have gone to the trouble to set up the elaborate system of funding incentives contained in the Act if it had simply intended to obligate the states to perform mandatory duties irrespective of the receipt of funding under the Act. If this was the intent of Congress, it was accomplished in an extremely convoluted manner. Second, the amendments of 1975 and 1978 to the Act both took effect only with respect to particular appropriations under the Act. P.L. 94-103, § 303; P.L. 95-602, § 515. There is no

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particularly this one, has concluded that the Congressional enforcement power under Section 5 is unlimited. See *Oregon* v. *Mitchell, supra,* at 128. (Opinion of Black, J.) Although it is recognized that the states surrendered a certain portion of their autonomy in the ratification of the Fourteenth Amendment, *Hutto* v. *Finney,* 437 U.S. 678 (1978), *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, (1976), the power granted to the national government thereunder may not "repeal other sections of the Constitution" or "strip the states of their power to govern themselves (and) convert (the) national government of enumerated powers into a central government of unrestrained authority." *Oregon* v. *Mitchell, supra,* at 128. Here the Third Circuit's decision implicates both limitations, for the relief ordered "traverses a power of self-determination inherent in the states." *Corpus* v. *Estelle,* 605 F.2d 175 (5th Cir. 1979): *cert. denied sub nom Estelle* v. *Corpus,* ____ U.S. ____ (1980).

The Court of Appeals recognized the central problem of the right it assumed Congress to have created when it referred to the statute as a "predicate for private substantive rights." 612 F.2d at 98. For unlike other enactments, such as that in *Morgan,* which were designed to "rectify inequalities put into effect by the states," see Bickel, *supra,* n. 10 at 97, the Act as

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indication that the Act ever was to become effective with respect to activities not funded by these appropriations. Had 42 U.S.C. § 6010 been enacted under the Fourteenth Amendment, a separate and additional statement of effectiveness would have been required. Third, the 1978 Amendments to the Act "clarified" 42 U.S.C. § 6010 by providing that "[t]he rights of persons with developmental disabilities described in findings made in this section are in addition to any *constitutional* or other rights otherwise afforded to all persons." (Emphasis added.) P.L. 95-602, see 1978 House Rep. at 19 (1978). This is an absolutely clear indication that Congress was not attempting to enforce existing rights applicable to all persons under the Fourteenth Amendment, but rather was making findings regarding the human rights of developmentally disabled persons in particular.

construed by the Third Circuit creates affirmative rights for one segment of a state's population without any finding of invidious discrimination.[13] In this respect the *Pennhurst* decision breaks new ground, for if Congress can act to create affirmative rights in the absence of any deprivation of liberty, or if it may act pursuant to Section 5 without any findings of invidious discrimination, then there is nothing left of state autonomy. Indeed if the Court of Appeal's construction of the creation of private substantive rights is upheld, Congress might carve out any area in which the states have traditionally acted and force the states to fund services for its citizens in that area, quite apart from any state action. Such a result would clearly violate the Tenth Amendment. See *National League of Cities* v. *Usery, supra.* Given that this Court has recognized that the provision of services to the mentally ill or mentally retarded has traditionally been reserved to the states, the result becomes even more untenable. See *Addington* v. *Texas,* 441 U.S. 418 (1979) and *Parham* v. *J.R.,* 99 S. Ct. 2493 (1979). Such a result is contrary to recognition that the states are to be given substantial discretion and flexibility in the resolution of such problems. See *Bell* v. *Wolfish,* 441 U.S. 520 (1979); *Maher* v. *Roe,* 432 U.S. 464 (1977). Furthermore, an interpretation of Section 5 which permits Congress to create affirmative rights apart from any state action and to force the states to fund those rights would violate the provisions of Art. IV, § 4 of the Constitution which guarantees "to every state a Republican Form of Government."

Lastly, there is a further reason why the court's construction of Section 6010(2) should not be upheld. The court construed section 6010(2) in a manner which, rather than resolving a matter of equal protection, *creates* serious constitutional problems for the states. Other citizens may now come forward to claim rights equal to those granted to the

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[13] Indeed, the Third Circuit has held that mental retardation is not a suspect class subject to such discrimination. See *Doe v. Colantti,* 592 F.2d 704 (3rd Cir. 1979) relying on this Court's decision in *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976) (per curiam).

developmentally disabled, namely, the right to the maximization of their potential in the most effective setting. It defies reason to believe that Congress intended such a chaotic result.

III.

CONCLUSION

The Developmentally Disabled Assistance and Bill of Rights Act was well received by the states when enacted. The assistance provided by the Act in further planning for eventual deinstitutionalization was welcomed by all state providers. The funding received by the states participating in the program, although limited, was and is an impetus to the process of developing community alternatives. To turn this valued program of assistance into a mandate requiring immediate creation of community living arrangements and the closure of institutions defies not only the stated purpose of the Act, but also reality.

A close look at the totality of the Federal Assistance Program to the states in caring for the developmentally disabled quickly points out the errors of the Third Circuit's construction of the Act. Congress under Title XIX, 42 U.S.C. § 1396 *et seq.* provides the states massive reimbursement for care provided in residential facilities for the developmentally disabled. In order to receive this Title XIX reimbursement, the states must demonstrate compliance with Medicaid regulations as promulgated by the Department of Health and Human Services (HHS). Those regulations strictly govern all aspects of services provided the developmentally disabled in state operated institutions. Once compliance is demonstrated, or at least a plan of compliance is proposed by the state and is accepted by HHS, federal reimbursement to aid in the running of the institutions is forthcoming.

If Congress by the Act was stating a clear preference for deinstitutionalization, surely federal Medicaid funding would have been terminated or drastically reduced. Such is not the case however, and Medicaid continues to be a major source of funding for state operated facilities.

The fiscal implications of the Third Circuit's decision on the states are of great concern to Amici. It must be pointed out that the State of Illinois, Department of Mental Health and Developmental Disabilities will spend a total of $255.4 million dollars in fiscal year 1981 for the care of its developmentally disabled, of which 72.2 million dollars will be spent to fund grants to community based programs. The community based programs have received an increase in funding of 10 million dollars over fiscal year 1980. Illinois received a total allotment of 1.8 million dollars pursuant to the Developmentally Disabled Assistance and Bill of Rights Act in fiscal year 1980.

Community based programs in the State of New Hampshire similarly received a threefold increase in funding in 1980-1981. The State of New Hampshire will spend approximately 28.7 million dollars to care for its disabled population. Only $250,000 will be received by New Hampshire under the Act in fiscal year 1981. It can be seen therefore that the assistance granted to the states under the Act pales in comparison to the massive investment the states have made on their own to begin the process of deinstitutionalization.

The process of deinstitutionalization cannot be accomplished as quickly and easily as the Third Circuit assumes. Deinstitutionalization is an individualized process that is extremely complex requiring the coordination of many fields of expertise and finite resources. Congress recognized the complexity of this task in requiring the states to implement plans toward the goal of deinstitutionalization, and providing limited financial assistance in developing those plans.

The Third Circuit's construction of the Act requires the states to do the impossible—immediately deinstitutionalize without the adequate funding, time or clinical resources necessary. Moreover, if that construction is allowed to stand continuous judicial review of individual placements will be necessary.

Such results were not intended by Congress and cannot be condoned by this Court.

Respectfully submitted,

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